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In the Supreme Court of the United States

OCTOBER TERM, 1946.

JOHN P. McWILLIAMS,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
No. 945

ESTATE OF SUSAN P. McWILLIAMS,
Deceased,
JOHN P. McWILLIAMS, Executor,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
No. 946

BROOKS B. McWILLIAMS,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
No. 947

PETITION FOR WRITS OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit, and
BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRITS OF CERTIORARI
To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioners pray that writs of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in these causes on December 2, 1946. Said Judgment reversed the judgment of the Tax Court of the United States in favor of petitioners and against respondent, relating to petitioners' federal income tax liability for the years 1940 and 1941.

JURISDICTION OF THE COURT.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; U. S. C. Title 28, Section 347a) and Section 1141 of the Internal Revenue Code (53 Stat. 154; U. S. C., Title 26, Section 1141).

STATUTE INVOLVED.

The Statute involved is Section 24(b)(1)(A) of the Internal Revenue Code, the relevant parts of which read as follows:

"Sec. 24. ITEMS NOT DEDUCTIBLE:

* * * * *

(b). *Losses from sales or exchange of property.*—

(1) *Losses Disallowed*:—In computing net income no deduction shall in any case be allowed in respect of losses from sales or exchanges of property directly or indirectly—

(A) Between members of a family as defined in paragraph (2)(D);

* * * * *

(2) * * *

(D) The family of an individual shall include only his brothers and sisters (whether by the whole or half blood) spouse, ancestors and lineal descendants; * * *"

QUESTIONS PRESENTED.

1. Whether under the rule in the *Dobson* case (320 U. S. 489) a decision of the Tax Court based upon substantial evidence that certain transaction did not constitute indirect sales between members of a family is reviewable by the Circuit Court of Appeals.

2. If such a question is reviewable by the Circuit Court of Appeals—whether sales of listed securities by petitioner to persons unknown, executed in the regular manner on the New York Stock Exchange, followed by a

purchase of similar securities represented by different stock certificates from persons, unknown, not those to whom petitioner sold, by a member of petitioner's family, executed in the regular manner on the New York Stock Exchange, constitute "sales or exchanges of property directly or indirectly between members of a family" within the meaning of Section 24(1)(b)(A) of the Internal Revenue Code.

STATEMENT OF THE MATTER INVOLVED.

The instant case was submitted on stipulations of fact (R. 20-22; 43-44; 54-56), Exhibits (R. 23-42; 45-53; 57-77) and oral testimony (R. 78-89). The material facts as found by the Tax Court are substantially as follows:

Petitioners John P. McWilliams and Brooks B. McWilliams, are husband and wife, and are residents of Cleveland, Ohio. Petitioner Susan P. McWilliams, deceased, was the mother of John P. McWilliams. She died in November, 1941, and John P. McWilliams was appointed executor of her estate. The income tax returns for the years involved were filed with the Collector of Internal Revenue for the Eighteenth District of Ohio. (R. 12.)

Petitioner John P. McWilliams in 1940 and 1941 bought and sold a considerable amount of securities for his own and his wife's account, and also for his mother's account until her death. Said petitioner's wife and mother both had large estates of their own which said petitioner managed for a number of years. (R. 12.)

The sales of securities which gave rise to the losses here in controversy were conducted as follows: In each instance said petitioner gave his broker an order by phone to sell for his or his wife's, or his mother's account a certain number of shares of a particular stock at market and, at the same time, instructed the broker thereafter to purchase at as nearly the same price as possible a like number of shares of the same stock for the account of one of the others. No restrictions were placed on the

orders—petitioners' securities were to be sold regardless of whether another petitioner could thereafter purchase similar securities at similar prices. In each instance the broker was told that the sale was for the purpose of establishing a tax loss. (R. 12.)

During the taxable years the following shares of stock were sold by said petitioner for his individual account, his wife's account, and his mother's account (R. 12-13; 45):

Docket No. 5945—John P. McWilliams

Year 1941

700 shares of International Nickel of Canada, Ltd.
200 shares of Eastman Kodak Co.
700 shares of General Electric Co.
100 shares of Monsanto Chemical Company
100 shares of Carro de Pasco
100 shares of Westinghouse Electric Co.

Docket No. 5947—Brooks B. McWilliams

Year 1940

300 shares of General Electric
100 shares of Standard Oil Co. of N. J.
200 shares of International Nickel Co. of Canada, Ltd

Year 1941

1000 shares of Basic Refractories, Inc.
300 shares of Libby-Owens-Ford Glass Co.
100 shares of E. I. DuPont deNemours Co.
200 shares of General Motors Corporation
100 shares of American Tel. & Tel. Co.
200 shares of Liggett & Myers Tobacco Co.

Docket 5946—Estate of Susan P. McWilliams
John P. McWilliams, Executor

Year 1940

100 shares of Eastman Kodak Co.

After the above securities had been sold by one of petitioners, another petitioner purchased similar securities with his or her own separately maintained funds.

All of the above securities were sold pursuant to orders given to Curtiss-House & Company, stockbrokers in Cleveland, Ohio, and were executed on the New York Stock Exchange in the regular manner by Clark, Dodge & Company, members of the New York Stock Exchange and correspondents of Curtiss-House & Company. The securities had all been acquired and held by the petitioners more than 18 months prior to their sale. The purchasers of the securities were unknown to the petitioners, and when one petitioner purchased securities similar to those sold by another petitioner, he or she purchased different securities, bearing different serial numbers, from sellers unknown to such petitioner, who were other than those who bought the selling petitioner's securities. (R. 13-14.)

Petitioner John P. McWilliams' wife and mother in 1940 and 1941 owned property greatly in excess of the amounts involved in the transactions under consideration. During all of their lives, their securities have stood in their own names and have been kept separate from those of said petitioner. Each has maintained a separate bank account and has filed separate income tax returns. (R. 13-14.)

On the above mentioned sales petitioner John P. McWilliams claimed long term capital losses of $21,276.53 in 1941, his wife $5,592.49 in 1940 and $13,946.95 in 1941, and his mother $1,755.79 in 1940. The deductions were disallowed by the Commissioner as coming within the provisions of Section 24(b) of the Internal Revenue Code, and deficiencies in income taxes were determined for the years and in the amounts as follows: (a) John P. McWilliams—$7,110.33 for the year 1941; (b) Estate of Susan P. McWilliams, $296.75 for the year 1940; (c) Brooks B. McWilliams, $1,845.52 and $4,184.07 for the years 1940 and 1941, respectively. (R. 11.)

The Tax Court held for petitioners and entered judgment of no deficiency, finding that there were no indirect sales between petitioners.

Upon appeal by the Commissioner, the Circuit Court of Appeals for the Sixth Circuit reversed the Tax Court (one judge dissenting). It is to obtain a review of such judgment that a writ of certiorari is hereby sought.

REASON RELIED UPON FOR THE ALLOWANCE OF THIS WRIT.

The decision of the Court below is in conflict with the decisions of this Court in *Dobson v. Commissioner*, 320 U. S. 489; *Commissioner v. Scottish American Company*, 323 U. S. 119; *Boehm v. Commissioner*, 326 U. S. 287; *Commissioner v. Flowers*, 326 U. S. 465; *John Kelley Company et al. v. Commissioner*, 326 U. S. 521; and with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Ickelheimer*, 132 Fed. 2d 660.

PRAYER.

WHEREFORE, petitioners respectfully pray that writs of certiorari issue to the Circuit Court of Appeals for the Sixth Circuit requiring that Court to certify and send to this Court for review and determination, a full and complete transcript of the record and all proceedings in the causes numbered and entitled on its docket "No. 10240—Commissioner of Internal Revenue, Petitioner, vs. John P. McWilliams, Respondent; No. 10241—Commissioner of Internal Revenue, Petitioner, vs. Estate of Susan P. McWilliams, Deceased, John P. McWilliams, Executor, Respondent; No. 10242—Commissioner of Internal Revenue, Petitioner vs. Brooks B. McWilliams, Respondent" and that the judgment of said Circuit Court of Appeals be reversed by this Court.

Petitioners' brief in support of their petition is annexed hereto.

JOHN A. HADDEN,
QUENTIN ALEXANDER,
Counsel for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1946.

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ESTATE OF SUSAN P. McWILLIAMS,
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BROOKS B. McWILLIAMS,
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BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Tax Court of the United States is reported at 5 T. C. 73. It is printed at pages 11 to 16 of the record. The opinion of the Circuit Court of Appeals is reported at C.C.H. 46-2 U.S.T.C. Par. 9404, and it is printed at pages 101 to 106 of the record.

JURISDICTION.

The statutes under which the jurisdiction of this Court is invoked are referred to in the petition for a writ of certiorari at page 1.

STATEMENT OF THE CASE.

A statement of the case is set out in the petition for a writ of certiorari, pages 3 to 6, and will not be here repeated.

ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals erred in the following particulars:

1. In reversing a factual finding of the Tax Court supported by substantial evidence, contrary to the decision of this Court in *Dobson v. Commissioner*, 320 U. S. 489, and succeeding cases decided by this Court, thereby resulting in a conflict with *Commissioner v. Ickelheimer*, 132 Fed. 2d 660.
2. In failing to allow petitioner deductions for long term capital losses which he sustained and which deductions were allowed by the Tax Court.

ARGUMENT.

The Circuit Court erred in reversing a finding of the Tax Court supported by substantial evidence, contrary to the rule first laid down by this Court in the Dobson case, and resulting in a conflict with the Ickelheimer case.

In the instant case the Tax Court weighed all the facts and made a finding that the transactions under consideration were not indirect sales between members of a family. This finding of fact, supported as it is by substantial evidence, cannot be reviewed by the Circuit Court of Appeals. Under the rule laid down by this Court in the *Dobson* case, the decision of the Tax Court need only "have warrant in the record and a reasonable basis in the law" to be nonreviewable; "the jurisdictional function is exhausted when there is found to be a rational basis for the conclusions approved by" the Tax Court. *Dobson v. Commissioner, supra.*

In the instant case the Tax Court found that the facts did not support the Commissioner's treatment of the trans-

actions under consideration as indirect sales between members of a family. In reaching its decision—that the transactions were not indirect sales—the Tax Court had many matters to consider. Petitioner's wife had ample funds of her own to make the purchases (R. 13-14), her property and securities were kept segregated from those of her husband (R. 14), petitioner sold his securities through the New York Stock Exchange to unknown purchasers and petitioner's wife bought through the New York Stock Exchange securities represented by different certificates from different sellers unknown to her (R. 13)—these were the facts upon which the Tax Court based its opinion. Had petitioner loaned his wife money to purchase securities similar to those which he sold, or had he sold his securities to a third person acting as a dummy, who in turn passed them on to petitioner's wife, the Tax Court would undoubtedly have found the transactions to be indirect sales between members of a family. But under the facts as they actually were in the instant case, the Tax Court found that there were no indirect sales. The Circuit Court, however, decided that the transactions did constitute indirect sales. Does the Circuit Court of Appeals have the power in each case to weigh the facts and determine for itself whether an indirect sale has been made, or under the rule of the *Dobson* case, *supra*, is not that function vested exclusively in the Tax Court?

Even under the doctrine formulated by the Circuit Court in its decision in the instant case, that Court would hold that some transactions, similar to the one here involved, were not indirect sales. Suppose that petitioner's wife had not purchased securities similar to those sold by petitioner (1) until a year had elapsed; (2) until six months had elapsed; (3) until one month had elapsed; (4) until one week had elapsed. In the first supposition, with a year's interval, it seems clear that the Circuit Court would not find an indirect sale. The same is true of six months and three months; but how about one month or one week? Can

it be said that as a matter of law an indirect sale has occurred when the interval is one week, but if there is a longer interval there is no indirect sale? The Circuit Court adopted this line of reasoning when it held that the Tax Court's finding was purely a matter of law, and then proceeded to determine, contrary to the Tax Court's finding, that the transactions constituted indirect sales. The Circuit Court thus exceeded its jurisdiction and substituted its finding of fact for that of the Tax Court, contrary to the rule laid down by this Court in *Dobson v. Commissioner, supra.*

As a result of this disregard of the *Dobson* rule, the decision of the Circuit Court in the instant case is in direct conflict with the decision of the Second Circuit Court of Appeals in *Commissioner v. Ickelheimer, supra.* That case involved the application of Section 24(b) (F) with respect to sales claimed to be indirectly between the fiduciary of a trust and the beneficiary of such trust. The taxpayer beneficiary sold certain bonds on the market over a ten day period and the trustee purchased with trust funds an equivalent number of the same bonds for the trust. The orders to sell were given to brokers and were executed in the regular manner on the New York Stock Exchange. The bonds purchased by the trustee were purchased through brokers in the regular manner on the New York Stock Exchange. Of the total of 100 bonds purchased by the trust, four bonds had the same serial numbers as those sold by the taxpayer and the remaining 96 bonds had different serial numbers. The Board of Tax Appeals held on the facts that there was no indirect sale between the taxpayer and the trust. This decision was affirmed by the Circuit Court of Appeals. In *Commissioner v. Kohn*, 1946 C. C. H. Par. 9393, a taxpayer sold through the New York Stock Exchange certain securities to persons unknown, and shortly thereafter his wife bought similar securities through the New York Stock Exchange from persons unknown. The Tax Court found that no indirect sales between members

of a family had taken place. On appeal, the Fourth Circuit Court of Appeals, disregarding the *Dobson* rule, decided that an indirect sale had taken place and reversed the Tax Court. The facts in each of these two cases and the instant case all differed somewhat.

As a result of these conflicting decisions, a taxpayer must plan his security transactions according to the part of the United States in which he resides. If he is a resident of the territory over which the Second Circuit Court of Appeals has jurisdiction, he may sell his securities in transactions similar to those in the instant case with the assurance that his resulting losses will be deductible. If he lives in the territories covered by the Fourth and Sixth Circuits, he will have similar transactions treated as nullities. And if he lives elsewhere in the country, the Tax Court will recognize the validity of his transactions, but he has no assurance as to what view of the matter his particular Circuit Court will take. This present state of confusion is manifestly unfair both to the taxpayer and the government. It is, however, capable of a simple solution. The solution does not lie in the formulation of a rule of law to be applied to varying sets of facts arising under this section of the Code; but rather in a recognition of the many variations of facts which so arise. The facts in every case vary, to a greater or lesser degree, from those in every other case. It is the function of the Tax Court to weigh those facts and from them determine its decision. It is the sole judge of the facts, and a Circuit Court of Appeals has no jurisdiction to substitute its interpretation of the facts for that of the Tax Court. *Dobson v. Commissioner, supra.* The conflicts arising from the decisions in the *Kohn, Ickelheimer*, and instant cases is the result of the disregard by the Courts of Appeals for the Fourth and Sixth Circuits of the proper function of the Tax Court. It is a conflict which should be remedied by this Court through application of the *Dobson* rule, with recognition of the Tax Court as the sole tribunal vested with authority to make findings of fact.

The Second Circuit Court in effect applied the *Dobson* rule when it decided the *Ickelheimer* case, although the latter case was decided earlier. Had the two other Circuit Courts done this in the *Kohn* case and the instant case, there would now be no conflict.

It should be emphasized, however, that even if the Circuit Court in the instant case had had jurisdiction to review the decision of the Tax Court, its decision was incorrect on the merits. The transactions here under consideration clearly did not come within the letter of the statute—nothing passed "between" petitioner and his wife—he sold property to X and his wife purchased other property from Y. Neither did the transactions come within the intent of the statute. This is well illustrated by the language of the Second Circuit Court of Appeals in *Commissioner v. Ickelheimer, supra.*

There the Court said:

> "The Commissioner concedes that this was no direct sale between the taxpayer and the trust of which she was a beneficiary, but argues that since the husband acted for his wife in making the sales and for the trust in making the purchases, the sales must be considered as 'indirectly' made 'between' her and the trust. We think not. The sales completely divested the taxpayer of any interest in the bonds and passed title thereto to unknown purchasers."
>
> * * * * *
>
> "Nor do we think that they were such as the purpose of the statute sought to embrace. * * * Congress did not express, and we see no reason to suppose that it entertained, any intention to disallow losses realized by bona fide sales on a public exchange. * * * Had Congress intended to strike down losses realized by a bona fide sale executed on a public exchange in case a member of the seller's family should purchase similar securities shortly thereafter, we think language more apt for the purpose would have been employed."

The Circuit Court erred in reversing the decision of the Tax Court in the instant case. In so doing it disregarded the decisions of this Court in *Dobson v. Commissioner, supra, Commissioner v. Scottish American Co., supra, Boehm v. Commissioner, supra, John Kelley Co. et al., v. Commissioner, supra, Commissioner v. Flowers, supra,* and the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Ickelheimer, supra.*

CONCLUSION.

Because the decision of the Circuit Court in the instant case is in conflict with the decisions of this Court, and because it is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit, petitioner requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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